1998

Pacific Development, L.C., a limited Liability Company, and Otto Belvedere v. Eric Orton, dba Orton Excavation : Reply Brief

Utah Court of Appeals

Richard D. Bradford; Kim H. Buhler; Bradford, Brady and Johnson; Attorneys for Appellee.
Scott L Wiggins; Arnold and Wiggins; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

980148

PACIFIC DEVELOPMENT, L.C., a Limited Liability Company, and OTTO BELVEDERE, Plaintiffs / Appellant, v. ERIC ORTON, dba ORTON EXCAVATION, Defendant / Appellee.	)	Case No. 980148-CA Priority No. 15 **ORAL ARGUMENT REQUESTED**

REPLY BRIEF OF APPELLANT, PACIFIC DEVELOPMENT, L.C.

Appeal from the Confirmation of Arbitrator's Award and Judgment of the Fourth Judicial District Court of Utah, Utah County, the Honorable Steven L. Hansen presiding.

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ARGUMENT

I. THE PLAIN LANGUAGE OF THE AGREEMENT TO ARBITRATE DEMONSTRATES THAT THE ARBITRATOR EXCEEDED THE AUTHORITY EXPLICITLY GRANTED TO HIM BY THE PARTIES AND THUS THE ARBITRATOR LACKED JURISDICTION TO RULE ON ISSUES CONCERNING PLAT B.

In the Brief of Appellee, Orton argues that "the Plat B issues were properly submitted to the arbitrator." Both the plain language of the Agreement to Arbitrate and Utah case law indicate otherwise.

"It is of course fundamental that the authority of the arbitrator springs from the agreement to arbitrate." *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1131 (3rd Cir. 1972); *see*

also Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 949 (Utah 1996) (stating that "to find that an arbitrator has exceeded his authority, a court must review the submission agreement and determine whether the arbitrator's award covers areas not contemplated by the submission agreement.").[1] Moreover, "[t]he powers of an arbitrator are defined by agreement of the parties: the question they submit both establishes and limits the arbitrator's jurisdiction." *Western Elec. Co. v. Communications Wkrs. of Am.*, 450 F.Supp. 876, 881 (E.D.N.Y. 1978) (citations omitted); *accord United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353 (1960) ("[A"rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"); *United Food and Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 946 (10th Cir. 1989); *Retail Store Employees Union Local 782 v. Sav-On Groceries*, 508 F.2d 500, 502-03 (10th Cir. 1975).[2] Contrary to the

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[1]The exceeding authority or powers ground is a statutory ground for vacating an arbitration award. *See* Utah Code Ann. §§ 78-31a-14(c) and 78-31a-15(b).

[2]In *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960), the United States Supreme Court emphasized that

> an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining

position asserted throughout the Brief of Appellee, "[i]t is the reviewing court's duty to determine whether the arbitrator has acted within that jurisdiction." *Id.*

In a recent opinion that discusses the exceeding the arbitrator's authority ground for vacating an arbitrator's award, the Utah Supreme Court, in *Intermountain Power Agency v. Union Pacific R.R. Co.*, 961 P.2d 320 (Utah 1998),[3] stated the following:

> We have clearly held under the above statutory framework [*i.e.*, the Utah Arbitration Act, Utah Code Ann. § 78-31a-1, *et seq.*] for vacating an arbitration award that an arbitrator exceeds his or her powers if the arbitrator strays beyond the scope of the questions submitted for arbitration by the parties. *See Buzas Baseball*, 925 P.2d at 949. The scope of the parties' dispute *as defined in their written agreement to arbitrate* establishes the scope of the arbitrator's authority in resolving the conflict.

Id. at 323 (emphasis added). The supreme court further stated that "[a]n arbitration award purporting to resolve questions beyond that jurisdictional boundary is not valid." *Id.* "For a court to find that an arbitrator has exceeded his or her delegated authority, the

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> agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id. at 597, 80 S.Ct. at 1361.

[3]The Utah Supreme Court's opinion set forth in *Intermountain Power Agency v. Union Pacific R.R. Co.*, 961 P.2d 320 (Utah 1998), which was issued July 7, 1998, is not cited in the Brief of Appellee.

court must determine that "'the arbitrator's award covers areas not contemplated by the *submission agreement.*'" (Emphasis added).

In the instant case, the Agreement to Arbitrate, which was drafted by Orton's legal counsel, states that the parties "acknowledge that the issues relating to the above-referenced Plat B of Riderwood Village have been resolved, and that, therefore, *the arbitration will focus on the remaining issues of the dispute, those which relate to Plat C,* thereby resolving all remaining issues in the case."[4] *See* R. 145, Agreement to Arbitrate, a true and correct copy of which is attached as Addendum A to the Brief of Appellant (emphasis added).

A. THE ALLEGED MODIFICATION OF THE AGREEMENT TO ARBITRATE CONCERNING ISSUES RELATING TO PLAT B, AS UNILATERALLY CLAIMED BY ORTON, IS VOID AND UNENFORCEABLE BECAUSE IT WAS NEITHER AGREED UPON NOR EVIDENCED BY WRITTEN AGREEMENT.

Notwithstanding the fact that the Agreement to Arbitrate limited the authority and jurisdiction of the arbitrator to those issues involving only Plat C, Orton, in his Brief, argues that "[t]he Agreement to Arbitrate was modified by mutual consent." *See* Brief of Appellee, pp. 13-21. Orton's argument, however, is fatally flawed in light of the plain language of the Agreement to Arbitrate, not to

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[4]At both page 14 and at the bottom of page 16 of the Brief of Appellee, Orton admits that the Arbitration Agreement between the parties, which Orton's legal counsel drafted, "ostensibly limits" the arbitrator's authority or jurisdiction to ruling on issues relating to Plat C only.

mention that the Utah Arbitration Act, as interpreted by the Utah Supreme Court, requires that all agreements to arbitrate be in writing.

In the recent arbitration case of *Jenkins v. Percival*, 962 P.2d 796 (Utah 1998),[5] the Utah Supreme Court stated the following:

> We hold that an arbitration agreement must be written to be enforceable under section 78-31a-4. Section 78-31a-3 provides that only "written agreement[s]" to submit a claim to arbitration are "valid, enforceable, and irrevocable." The logical extension of this language is that until an agreement to arbitrate is reduced to writing, it is invalid, unenforceable, and revocable.[6]

Id. at 800 (brackets included); *accord Russell v. World Famous, Inc.*, 767 P.2d 456, 457 n.3 (Or. Ct. App. 1989) ("Agreements to arbitrate must be in writing"); *Coast Trading Co., Inc. v. Pacific Molasses Co.*, 681 F.2d 1195, 1197 (9th Cir. 1982). The Utah Supreme Court reasoned that "[b]y employing the language 'arbitration agreement' in both the title to section 78-31a-3 and the body of § 78-31a-4(1), the Legislature signaled a correlation between the two sections. Thus, mandating 'written agreement[s]' under section 78-31a-3 is tantamount

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[5]Orton failed to cite to or otherwise recognize the Utah Supreme Court's opinion in *Jenkins v. Percival*, 962 P.2d 796 (Utah 1998), which was issued on July 10, 1998.

[6]"Whether an arbitration agreement is enforceable is a question of law, and therefore, the appellate court reviews the trial court's determination, which in the instant case was a confirmation of the arbitrator's award, for correctness. *Jenkins v. Percival*, 962 P.2d 796, 798 (Utah 1998).

to requiring a party to prove a written 'arbitration agreement' under section 78-31a-4." *Id.* (brackets included and footnote omitted).

In the case at bar, the express language of the Agreement to Arbitrate limits the jurisdiction and authority of the arbitrator to determining only those issues relating to Plat C. *See* R. 145, Agreement to Arbitrate, a true and correct copy of which is attached as Addendum A to the Brief of Appellant. Thus, it follows, that the alleged modification concerning Plat B of the Agreement to Arbitrate, being unwritten, is void and unenforceable. *See Intermountain Power Agency v. Union Pacific R.R.*, 961 P.2d 320, 323 (Utah 1998) ("The scope of the parties' dispute as defined in their written agreement to arbitrate establishes the scope of the arbitrator's authority in resolving the conflict").

Orton argues that unilateral and unacknowledged correspondence from his legal counsel to legal counsel for Pacific Development, L.C., somehow establishes that the written Agreement to Arbitrate, which was drafted by Orton's legal counsel, was modified to include issues concerning Plat B. *See* Brief of Appellee, pp. 17-19. A closer review of the correspondence referenced by Orton in his Brief, however, reveals the inaccuracy of Orton's position.

The letter, dated April 28, 1997, from Orton's legal counsel to legal counsel for Pacific Development, L.C., which preceded the Agreement to Arbitrate, stated the following:

> I also understand from that same conversation that *Plat B was essentially at a break even,* and the amounts owing are on Plat C. I understand that to mean that the signed and unsigned change orders on Plat B are no longer contested, and that *the only contested issues relate to the unsigned change orders on Plat C.*

See R. 213-19, Letter from Orton's legal counsel to counsel for Pacific Development, L.C., dated April 28, 1997, p. 1, ¶3 (emphasis added). The language of the above-referenced letter indicates that "Plat B was essentially at a break even", and that "the amounts owing [were] on Plat C." Shortly thereafter, the parties executed the Agreement to Arbitrate, which, consistent with the language of the April 28, 1997, letter, limits the scope of the arbitrator's authority to resolve issues relating only to Plat C. The fact that matters on Plat B were resolved and were at a "break even" point, is further confirmed by the second letter referenced by Orton, which is dated June 11, 1997, two days after the Agreement to Arbitrate was executed by the parties. In the June 11, 1997, letter, Orton's legal counsel clarified why the issues relating to Plat B were resolved. Orton's counsel stated the following:

> At one point, Otto claimed to have overpaid Orton Excavation on Plat "B" by $46,771.90. However, when all of the extras on Plat "B" are included (signed change orders = $21,907.85; unsigned change orders = $24,600.67; total = $46,508.52), those come to within $263.38 of the $46,771.90 that Belvedere claim to have overpaid. By agreeing to those extras and changes on Plat "B," *that eliminates any remaining disputes on Plat "B."*

See R. 209-11, Letter from Orton's legal counsel to counsel for Pacific Development, L.C., dated June 11, 1997, p. 2, ¶3 (emphasis added).

Orton's assertion concerning the correspondence or letters from his counsel is nullified because the letters were unacknowledged by counsel for Pacific Development, L.C. Further, other than the limiting language of the Agreement to Arbitrate, Orton points to nothing in terms of a writing between the parties to indicate the assent of Pacific Development, L.C., that the issues to be resolved by the arbitrator included Plat B. *See Jenkins*, 962 P.2d at 800; *cf.* Utah Code Ann. § 25-5-4 (Supp. 1997) (providing that writing memorializing a contract within the statute of frauds must be "signed by the party to be charged with the agreement") and *Guinand v. Walton*, 22 Utah 2d 196, 199-200, 450 P.2d 467, 469 (1969) (holding that letter from party to be charged satisfied statute of frauds).

B. NOTWITHSTANDING THE LANGUAGE IN THE AGREEMENT TO ARBITRATE THAT LIMITED THE ARBITRATOR'S AUTHORITY AND JURISDICTION TO RESOLVE ISSUES RELATING ONLY TO PLAT C, PACIFIC DEVELOPMENT, L.C., OBJECTED THAT THE ARBITRATOR DID NOT HAVE THE AUTHORITY OR JURISDICTION TO DETERMINE ISSUES RELATING TO PLAT B.

Orton claims that Pacific Development, L.C., "at no time during the entire arbitration" objected to the arbitrator hearing or determining issues relating to Plat B. *See* Brief of Appellee, pp. 19 and 20. This claim is a misrepresentation or both the record and

proceedings. Moreover, in light of the plain language in the Agreement to Arbitrate limiting the arbitrator's jurisdiction and authority to resolve issues relating only to Plat C, even if Pacific Development, L.C., did not object, such did not operate as a waiver.

Notwithstanding the jurisdictional limitation of the arbitrator set forth in the Agreement to Arbitrate, during the course of the arbitration proceedings, Orton, through counsel, presented evidence on matters concerning both Plat B and Plat C. In addition to the evidence presented on Plat C, Pacific Development, L.C., presented evidence to counter the claims of Orton relating to Plat B. As evinced by way of its written closing argument submitted to the arbitrator, the primary purpose of the submission of evidence by Pacific Development, L.C., concerning Plat B was to establish the course of dealing and expectation between the parties for comparison of dealings between the parties on Plat C. *See* R. 201-04, Closing Argument submitted by Pacific Development, L.C., to the arbitrator. Such a comparison was important for purposes of establishing during the arbitration the breach by Orton Excavation of the implied duty of good faith and fair dealing in the course of performing excavation services and products on Plat C. *See* R. 143, Final Arbitration Award, ¶3.[7]

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[7]Orton Excavation contracted with Pacific Development, L.C., to install culinary water, sanitary sewer, storm drain lines, and other excavation related services, including imported fill material, on Plats B and C. *See* Brief of Appellee, Statement of Fact No. 2. The

On November 7, 1997, the arbitrator issued his Interim Arbitration Award, thereby inviting, by virtue of its temporary nature, objections or comments concerning the award. *See* R. 187-92, Interim Arbitration Award. In that Interim Arbitration Award, the arbitrator, in direct contravention to the plain language of the parties' Agreement to Arbitrate, proceeded to rule on issues involving Plat B. *Id.* Thereafter, Pacific Development, L.C., objected to the interim award by filing a Motion for Reconsideration, objecting that the arbitrator lacked jurisdiction and authority to rule on Plat B issues and requesting that the arbitrator reconsider its ruling in light of the well-established implied duty of good faith and fair dealing that Orton breached in the course of using over three times the amount of fill material reasonably and fairly necessary to complete Plat C (*See* R. 181-85, Motion for Reconsideration). Shortly thereafter, Orton filed his Opposition to the Motion for Reconsideration (*See* R. 177-80, Opposition to Motion for Reconsideration). On December 24, 1997, the arbitrator issued his Final Arbitration Award, overruling the objections. *See* R. 138, Final Arbitration Award.

As demonstrated above, Pacific Development, L.C., contrary to Orton's assertion, did in fact object to the arbitrator resolving

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parties executed a subcontract for Plat B on April 20, 1994. *Id.* Thereafter, on October 10, 1994, the parties executed a subcontract for Plat C. *Id.*

issues related to Plat B. Notwithstanding the detailed and written objection by Pacific Development, L.C., to the scope of arbitrator's authority, "participation in an arbitration does not waive an objection to the scope of the award." *Russell v. World Famous, Inc.*, 767 P.2d 456, 457 (Or. Ct. App. 1989) (citing *Gamble et ux v. Sukut*, 208 Or. 480, 486-88, 302 P.2d 553 (1956)). The fact that a party does not waive objection to the scope of an arbitrator's award by participating in the arbitration is consonant with the well-established legal principle that the confines of the arbitrator's authority to resolve conflicts, as defined by the parties written agreement, is jurisdictional in nature. *See Intermountain Power Agency v. Union Pacific R.R.*, 961 P.2d 320, 323 (Utah 1998) ("An arbitration award purporting to resolve questions beyond that jurisdictional boundary is not valid"); *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 949 (Utah 1996) (citing *Western Elec. Co. v. Communications Wkrs. Of Am.*, 450 F.Supp. 876, 881 (E.D.N.Y. 1978)) ("It is the reviewing court's duty [under the exceeding authority test] to determine whether the arbitrator has acted within that jurisdiction"); *Leahy v. Guaranty National Ins. Co.*, 907 P.2d 697, 699 (Colo. Ct. App. 1995) ("The scope of an arbitration panel's jurisdiction depends upon the issues actually submitted to it for determination in the parties' proposals for arbitration"); *Executone Information Systems, Inc. v. Davis*, 26 F.3d 1314, 1323 (5th Cir. 1994) ("It is well-settled that the arbitrator's

jurisdiction is defined by both the contract containing the arbitration clause and the submission agreement"); *Coast Trading Co., Inc. v. Pacific Molasses Co.*, 681 F.2d 1195, 1197 (9th Cir. 1982).

Orton's argument concerning both the modification of the Agreement to Arbitrate and waiver are further undermined by the fact that "arbitration is a creature of contract." *Matteson v. Ryder System Inc.*, 99 F.3d 108, 114 (3rd Cir. 1996). As in contract law, the touchstone for interpreting an agreement to arbitrate must be the intention of the parties. *See Intermountain Power*, 961 P.2d at 325 (citing *Turner v. Hi-Country Homeowners Ass'n*, 910 P.2d 1223, 1225, 1226 (Utah 1996)) ("We have clearly held that '[i]n the interpretation of a contract, the parties' intentions should be determined from the words of the Agreement"). Hence, the arbitrator should deduce the parties' contractual intent as to the scope of authority for resolving conflicts from the language of the Agreement. *Id.* After all, "[i]t is the parties, not the arbitrator, who decide the issues submitted . . . ." *Matteson*, 99 F.3d at 114; *see also Intermountain Power*, 961 P.2d at 323 ("An arbitration award purporting to resolve questions beyond that jurisdictional boundary [*i.e.*, the written agreement to arbitrate] is not valid").[8]

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[8]At page 23 of the Brief of Appellee, Orton claims that the subcontract agreement between the parties "required all disputes to be submitted to arbitration." Orton's argument is in direct contravention to the plain language of the Agreement to Arbitrate, as executed by the parties, expressly limiting the arbitrator's authority and jurisdiction to resolve issues related to *Plat C only*.

II. BOTH THE INTERIM ARBITRATION AWARD AND THE FINAL ARBITRATION AWARD OF THE ARBITRATOR DEMONSTRATE THAT THE HE MANIFESTLY DISREGARDED WELL-ESTABLISHED CONTRACT LAW CONCERNING BOTH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AND THE PROHIBITION OF ADDING TERMS TO A CONTRACT THAT THE PARTIES OMITTED.

Orton, at page 26 of his Brief, erroneously asserts that "the 'manifest disregard of the law" argument [sic] is not even adopted in Utah." In *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941 (Utah 1996), the Utah Supreme Court, in the course of analyzing the manifest disregard ground due to it being raised on appeal and relied upon by the trial court below, expressly reserved the issue of whether this ground is recognized in Utah inasmuch as the *Buzas Baseball* case was decided on other grounds. *Id.* at 951 n.8, 949. Thus, this issue is a matter of first impression directly before this Court.[9]

The manifest disregard of the law ground for overturning an arbitration award is a judicially created doctrine that stems from the exceeding authority statutory ground.[10] *Buzas Baseball, Inc. v.*

Moreover, the record indicates that the parties agreed to submit the matter to arbitration rather than being compelled by language of the subcontract agreement to do so. *See* R. 123, Minute Entry (documenting the request by Orton's counsel to temporarily strike the scheduled trial dates for arbitration proceeding).

[9]By discussing the analysis to be utilized in applying the ground of manifest disregard of the law, the Utah Supreme Court implied that it is a valid ground for vacating an arbitrator's award. *See* Utah Code Ann. § 78-31a-14.

[10]A good part of Orton's Brief is dedicated to arguing that neither the district court nor this Court can reach the merits of the

Salt Lake Trappers, Inc., 925 P.2d 941, 951 (Utah 1996) (citing *Wilko v. Swan*, 346 U.S. 427, 436-37, 74 S.Ct. 182, 187 (1953) ("[T]he interpretations of the law by the arbitrators[,] *in contrast to manifest disregard*[,] are not subject . . . to judicial review for error . . . ." (emphasis added)); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2nd Cir. 1960). "If arbitrators manifestly disregard the law in making their award, they can be said to have exceeded their authority."[11] *Id.*; *see also Eljer Manuf., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) (stating that the arbitrator's decision will be set aside "if in reaching his result, the arbitrator deliberately disregards what he knows to be the law.") (citing *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992); *Jenkins v. Prudential-*

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arbitrator's award. *See* Brief of Appellee, pp. 30-38. "Effusively deferential language notwithstanding, the courts are neither entitled nor encouraged simply to 'rubber stamp' the interpretation and decisions of arbitrator." *Matteson v. Ryder System Inc.*, 99 F.3d 108 (3rd Cir. 1996) (citing *Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674*, 916 F.2d 63, 65 (2nd Cir. 1990) ("this great deference, however, is not the equivalent of a grant of limitless power"). "Courts still maintain a significant role in the . . . arbitration process." *Id.* Moreover, "they have not been relegated to the status of merely offering post-hoc sanction for the action of arbitrators. Rare though they may be, there will be instances when it is appropriate for a court to vacate the decision of an arbitrator." *Id.* at 113-14. The instant case is one of them.

[11]The district court's determination that the arbitrator did not manifestly disregard the implied covenant of good faith and fair dealing is a conclusion of law, which this Court reviews for correctness. *DeVore v. IHC Hosps., Inc.*, 884 P.2d 1246, 1251 (Utah 1994).

Bache Sec. Inc., 847 F.2d 631, 634 (10th Cir. 1988) (characterizing the "manifest disregard" standard as "willful inattentiveness to the governing law."); and *Jeppson v. Piper, Jaffray & Hopwood, Inc.*, 879 F.Supp. 1130, 1133 (D. Utah 1995). According to the federal case law address the issue,

> Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.

Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930, 933 (2nd Cir. 1986) (citations omitted).

In the instant case, the arbitrator, in his temporary or Interim Arbitration Award, arrived at the following determination concerning the claim that Pacific Development, L.C., was due a credit or offset for Orton Excavation utilizing too much fill material on Plat C:

> Pacific claims that it is entitled to a credit or offset to the claims of Orton alleging that Orton used too much imported material. The problem appears to be inherent to the unit price contract that was entered into by the parties. Unit price contracts have advantages and disadvantages. Pacific properly points out that under a unit price contract Orton has no incentive to be judicious in its use of material being paid for by the unit. On the other hand, Pacific only pays for what is actually used. Pacific, however, entered into the unit price type of contract. If Pacific wanted to exercise better control over the useage [sic] of material its [sic] should have had a representative (typically an engineer) on site to see

> that material was being properly used. During the performance of much of the work in Plat B Pacific had such a representative on site. During the performance of work on Plat C Pacific had no such representative on site. The Arbitrator does not find that the evidence supports a finding that Orton wasted material. There was evidence presented by Pacific that more material was used in Plat C than maybe Pacific thought should be used. Pacific, however, did not meet its burden of proof on that issue. The computations by Fred Clark were general in nature omitting some lengths of pipe installation, [sic] assumed that Orton was responsible to cut the road for rough grading, etc.

R. 187-88, Interim Arbitration Award, ¶22. As previously mentioned, Pacific Development, L.C., upon receiving and reviewing the arbitrator's Interim Arbitration Award, objected by way of its Motion for Reconsideration, arguing that Orton breached the implied duty of good faith and fair dealing by utilizing over three times the amount of fill material reasonably required to complete Plat C. *See* R. 184, Motion for Reconsideration. In support, Pacific Development, L.C., cited various Utah cases setting forth and discussing the well-established implied duty of good faith and fair dealing. *See id.* Notwithstanding, the arbitrator thereafter issued his Final Arbitration Award, which included the identical paragraph 22 as that previously set forth in the temporary Interim Arbitration Award. R. 140, Final Arbitration Award, ¶22. The arbitrator included the following additional paragraph in the final award:

> Pacific's Motion for Reconsideration is denied. The Arbitrator heard the arguments during the course of the proceeding that are being reargued by Pacific. Pacific's argument is based largely upon its argument

> that Orton had within its scope of work the obligation to perform the rough grading of the roadway. The Arbitrator specifically found that the contract did not require that work to be done by Orton. *Orton obviously has a duty of good faith and fair dealing with Pacific.* The Arbitrator, however, further found that Pacific did not [sic] its burden of proof of its allegation that Orton wasted material in Plat C.

See id. at R. 138, ¶25 (emphasis added).

By ruling in paragraph 22 of the Final Arbitration Award that the problem "appears to be inherent" in the unit price contract entered into by the parties, and that if "Pacific wanted to exercise better control over the useage [sic] of the material its [sic] should have had a representative (typically an engineer) on site to see that material was being property used", the arbitrator manifestly disregarded the well-established contract principle that each party to a contract has an implied covenant of good faith and fair dealing with the other party to the contract. *See St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 199 (Utah 1994).

By way of the covenant of good faith and fair dealing, "each party impliedly promises that he will not intentionally or purposely do anything that will destroy or injure the other party's right to receive the fruits of the contract." *Id.* (citing *Bastian v. Cedar Hills Investment & Land Co.*, 632 P.2d 818, 821 (Utah 1981); *Ferris v. Jennings*, 595 P.2d 857 (Utah 1979)); *see also Republic Group, Inc. v. Won-Door Corp.*, 883 P.2d 285, 291 (Utah Ct. App. 1994) (citing *St. Benedict's Dev.*, 811 P.2d at 199-200; *Andalex Resources, Inc.*, 871

P.2d 1041, 1047-48 (Utah Ct. App. 1994)). "A violation of the covenant gives rise to a claim for breach of contract." *Id.* The covenant of good faith and fair dealing is especially applicable where, as in the instant case, one party under the contract grants the other party discretion to determine such terms as quantity, price, or time of performance. *See, e.g., Cook v. Zions First National Bank*, 919 P.2d 56 (Utah Ct. App. 1996).

Deliberate disregard of the law concerning the covenant of good faith and fair dealing by the arbitrator is further demonstrated by his acknowledgment that the parties entered into a unit price contract and his detailed discussion of the inherent "problems" with such contracts. In direct contravention to this acknowledgment and discussion, the arbitrator then ruled that "[i]f Pacific wanted to exercise better control over the useage [sic] of material its [sic] should have had a representative (typically an engineer) on site to see that material was being property used." In the course of utilizing this as the basis for its ruling, the arbitrator not only manifestly disregarded the principles of law regarding the implied covenant of good faith and fair, but it implied a new term in the unit contract entered into by the parties by requiring that Pacific in fact hire an employee, *i.e.*, an engineer, to monitor the fill material utilized by Orton in the course of completing Plat C. *See Hal Taylor Assocs. v. Unionamerica, Inc.*, 657 P.2d 743, 749 (Utah 1982) (holding that "this court will not rewrite a contract to supply

terms which the parties omitted."). By requiring this, the arbitrator essentially relieved Orton of the duty to act both in good faith and fairly with Pacific Development, L.C.[12]

CONCLUSION

Based on the foregoing, Pacific Development, L.C., respectfully requests that this Court reverse the district court's Order Confirming the Arbitrator's Award and remand the case with instructions to vacate the arbitrator's award and to determine an award of attorney fees and costs for Pacific Development, L.C., incurred on appeal as well as the entry of any orders or proceedings consistent with this Court's instructions set forth in its Opinion.

RESPECTFULLY SUBMITTED this 10th day of May, 1999.

ARNOLD & WIGGINS, P.C.

Scott L. Wiggins
Attorneys for Appellant

[12]Paragraph 25 of the Final Arbitration Award demonstrates that the arbitrator appreciated the existence of the clearly governing legal principle concerning the implied duty of good faith and fair dealing but decided to ignore or pay no attention to it.

CERTIFICATE OF MAILING

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed (2) true and correct copies of the foregoing **Reply Brief of Appellant**, postage prepaid, to the following, on this 10th day of May, 1999:

Mr. Richard D. Bradford
Ms. Kim H. Buhler
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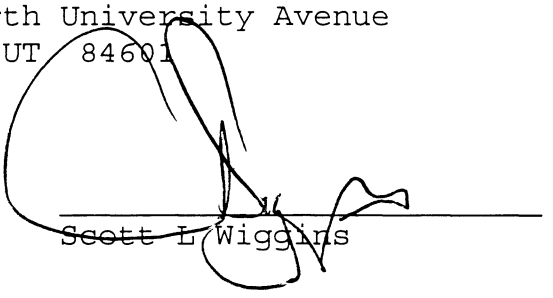
389 North University Avenue
Provo, UT 84601



Scott L Wiggins

ADDENDUM

No Addendum is necessary pursuant to Utah Rule of Appellate Procedure 24(a)(11).